Supreme Court, U.S.
FILED
NOV 15 2002
CLERK

(8)

No. 02-575

In the
Supreme Court of the United States

NIKE, INC., ET AL.,
Petitioners,

v.

MARC KASKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF PETITIONERS

WILLIAM L. STERN
SEVERSON & WERSON
1 EMBARCADERO CENTER
SUITE 2600
SAN FRANCISCO, CA 94111
(415) 398-3344

FRED J. HIESTAND
Counsel of Record
1121 L STREET
SUITE 404
SACRAMENTO, CA 95814
(916) 448-5100

Counsel for Amicus Curiae

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Respondent has refused to consent to the filing of an amicus curiae brief by the Civil Justice Association of California (CJAC). Accordingly, CJAC hereby moves, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amicus curiae* brief in support of Nike Inc., et al.'s Petition for a Writ of Certiorari. The brief immediately follows this motion.

Amicus is a twenty-five year old non-profit organization whose membership is made up of hundreds of businesses, professional associations and local governments. Our principal purpose is to educate the public about ways to improve the state's civil liability laws in terms of fairness, efficiency, economy and certainty. Toward these ends, CJAC regularly petitions the government – the judiciary, the legislature and, through the initiative process, the people themselves – for redress of laws concerning who pays, how much, and to whom when wrongful conduct is charged.

California's Unfair Competition Law ("UCL") figures prominently in CJAC's efforts to restore some semblance of fairness and sanity to the scope and application of liability laws. It has become, for reasons we explain, a major source of unfairness to those caught within its prohibitory sweep against "business practices" deemed "unlawful, unfair or fraudulent . . . [or] unfair, untrue or misleading advertising." (Cal. B & P Code § 17200.)

CJAC participated as amicus curiae in support of petitioner Nike, Inc. in the California Supreme Court because we feared that if appellant ultimately prevailed in his argument there will be no realistic opportunity for those who wish to publicly defend themselves against what they perceive as unfair attacks on their business practices without paying

dearly for that defense. We argued that when, as here, it comes to publicly uttered statements by a company in its own defense against charges that its overseas subcontractors are violating the laws of the countries in which they operate, the constitutional guarantee to freedom of expression should trump the ban of the UCL against false or misleading advertising. We seek to participate here for the same reason, and with the purpose of informing the Court about various anomalies of the UCL in comparison with analogous laws of other states that make this case suitable for a grant of certiorari.

Respectfully submitted,

Fred J. Hiestand
Counsel of Record
1121 L Street, Suite 404
Sacramento, CA 95814
(916) 448-5100

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INTEREST OF AMICUS CURIAE[1]

The Civil Justice Association of California ("CJAC" or "amicus") is a twenty-five year old non-profit organization whose membership is made up of hundreds of businesses, professional associations and local governments. Our principal purpose is to educate the public about ways to improve the state's civil liability laws in terms of fairness, efficiency, economy and certainty. Toward these ends, CJAC regularly petitions the government – the judiciary, the legislature and, through the initiative process, the people themselves – for redress of laws concerning who pays, how much, and to whom when wrongful conduct is charged.

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[1] This brief was written in whole by CJAC's counsel, and not at all by Nike, Inc. Further, CJAC made the only monetary contributions in the preparation of this brief.

violating the laws of the countries in which they operate, the constitutional guarantee to freedom of expression should trump the ban of the UCL against false or misleading advertising. We seek to participate here for the same reason, and with the purpose of informing the Court about various anomalies of the UCL in comparison with analogous laws of other states that make this case suitable for a grant of certiorari.

INTRODUCTION

The UCL is unlike any other unfair trade practice or false advertising law – state or federal – in this country. It bars anyone from engaging in "unlawful, unfair or fraudulent" activity, or "unfair, untrue or misleading advertising," terms broad enough to sweep within their ambit just about anything imaginable that gives offense to someone. No one need actually suffer injury from, or be deceived by, the conduct complained about in order to sue under the UCL. A defendant stung by it, however, can take no solace from a judgment rendered that the matter is concluded because there is no *finality* to UCL litigation. It just keeps on keeping on. A new and different plaintiff may, acting on behalf of the general public, sue the same defendant for the exact same complained of activity that was just resolved in an earlier UCL suit. (*Stop Youth Addiction v. Lucky Stores, Inc.* (17 Cal4th 553, 583 (1998)).) While damages are not recoverable, injunctive relief and restitution are; and a defendant ordered to pay back money under the restitution remedy can be forgiven for not fathoming how this differs from being socked with a damage award. On top of all this, a successful plaintiff can often obtain court-awarded attorney's fees for prosecuting the UCL claim as a self-appointed representative of the amorphous "public," an extraordinary "bounty hunter" feature from another law that,

brigaded with the UCL, makes it almost self-executing. (Cal. C. of Civ. Proc. § 1021.5.)

The UCL did not start out this way, overreaching laws rarely do. It instead grew from a modest codification of the common law of unfair competition into today's virtual omnibus law by the process of accretion combined with occasional "leaps" of legislative and judicial gloss placed on it. Understanding how that growth occurred makes clear why, unless this Court acts now, the UCL will remain uncabined and unconfined, an omnivorous statute that impairs legitimate business activities, chills free expression and treads on the public interest.

STATEMENT

This case presents a constitutional issue of immense importance—*viz.*, are statements that a company makes in press releases and news conferences defending itself against charges that it subcontracts with foreign businesses who engage in unfair or unlawful practices, subject to liability under the UCL[2] notwithstanding the protections of the First Amendment; and, if so, can the company be ordered to undertake a court-approved public information campaign to remedy its alleged "false advertising"? The trial and intermediate state appellate court said "No," but a bare majority of the California Supreme Court disagreed.

By "false advertising" respondent Marc Kasky, a self-appointed member of the public on whose behalf he brings suit,[3] refers entirely to statements made by "just do it"

[2] Cal. B & P C § 17200 et. seq.

[3] Cal. B & P C § 17204, which specifies who can bring UCL suits, "has been interpreted by the . . . Court to authorize standing for *any person or organization* to sue to enjoin an unfair practice, regardless of whether the person or organization has suffered injury as a result of the practice." McCall, Sturdevant, Kaplan & Hillebrand, *Greater Representation for*

athletic shoe maker, Nike. These statements were made in press releases, letters to the editor and the like, wherein Nike defended itself against charges by its critics concerning the wages, hours, and working conditions in its subcontracted Asian footwear factories. The gravamen of the complaint is that "Nike's athletic shoes are made in [overseas] sweatshops," but there is no attempt in this UCL action to get directly at those "sweatshops" in the countries where they operate. Neither does respondent claim that the UCL prohibits Nike from contracting with overseas companies who are in violation of their own country's laws on wages and working conditions. He has not, so far at least, attempted to "bootstrap" the violation of applicable foreign law by a Nike subcontractor onto the "unlawful" or "unfair" prongs of the UCL and thereby get at Nike in California, an approach which, if successful, would convert California courts applying the UCL into international ombudsmen, and jettison long established principles of national sovereignty and international law.

What respondent cannot accomplish directly by getting at the conduct to which he objects, however, he has achieved indirectly by getting at the "speech" given in defense or denial of that conduct. This "indirection" is in terms of the law used (the UCL rather than the laws of the foreign countries where the subcontractors operate) and the target (not the subcontractors themselves, but the domestic U.S. company with whom they contract to make shoes, Nike). By categorizing Nike's statements in defense of its business dealings with its overseas subcontractors as "commercial speech," respondent claims, and a majority of the state's highest court agrees, that expression is subject to regulation

California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions (1995) 46 *HAST. L.J.* 797, 814-815 and authorities therein cited. (Italics added.)

under the UCL, specifically the prohibition against "fraudulent business practices." This is an especially draconian provision, as judicial gloss on it makes actionable "speech" that does not involve advertising and even practices that involve no untrue statements.[4] All a plaintiff need show to prevail under this prong of the UCL is the likelihood of public deception, not that any member of the public was actually deceived.

Now, it has long been a cornerstone of First Amendment jurisprudence that just because government can abolish an activity does not mean that it can suppress "speech" concerning that activity.[5] While creation of the "commercial speech" category has resulted in occasional backsliding from this principle,[6] respondent and California's high court have reduced it to a new nadir by standing it on its head—*i.e.*, while state law can do nothing directly about the objected to conduct of foreign "sweatshops," the UCL prohibits any speech in defense of that alleged conduct which is "misleading or false" by anyone who has business dealings with the subcontractors. If this seems a bit of overstatement, it is not. The UCL does not define what is a "business practice," but it is clear that it can be a single past act and is likely as broad as the business practices that come within the sweep of the Unruh Civil Rights Act, Cal. Civ. C. §51: "[e]verything about which one can be employed," and

[4] See *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432 and *American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 696-699.

[5] See, e.g., *Pickering v. Board of Education* (1968) 391 U.S. 563 (though school board may terminate from employment a non-tenured teacher for no reason whatsoever, it cannot fire her for writing a letter to the editor of which it disapproved.).

[6] See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.* (1986) 478 U.S. 328, 345.

"synonymous with calling, occupation, or trade engaged in for the purpose of making a livelihood or gain."[7]

Carried to the limits of its logic, respondent's position, sanctioned by the state supreme court, permits maintenance of a UCL action against a newspaper that "falsely" or "misleadingly" defends the labor practices of Nike's Asian subcontractors. After all, publication of the "false" or "misleading" article, editorial or advertisement would be done in the course of the newspaper's business practice. It would undoubtedly be in furtherance of a "commercial transaction," i.e., selling the newspaper to readers and the advertisement to those who pay to run it. Curiously, a boycott of Nike goods by appellant and those who wish to bring pressure on Nike to improve its foreign subcontracting business is protected by the First Amendment; but if respondent has his way, a rebuttal to that boycott must be monitored by the court under the UCL for its truthfulness. (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886 (economic boycott by civil rights organization protected by First Amendment).)

Respondent and the narrowest majority possible of the California Supreme Court would, in other words, have the government instead of the public act as arbiter of what is "true" and "false" in public debate over compliance by foreign subcontractors with the laws of the countries where they do business. This is not, to say the least, a role the federal or state constitutions favor for government. "[Authoritative] interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker."[8] Nonetheless,

[7] *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 468.

[8] *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270-271.

unless this Court reverses the decision below, those who do business in California will be subject to government regulation through liability laws for publicly defending their business practices. It is an *in terrorem* means of regulation because the UCL is unprecedented in the breadth of its scope, its absence of any standing requirements and the lack of finality in its application.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The UCL was, like Mary Shelley's Frankenstein, created with good intentions that have now, as this case shows, plainly gone awry. Its creators are two co-equal and co-ordinate branches of state government – the legislature and the courts. Each added a dimension or attribute to the UCL during its growth over the past three decades, some seemingly minor at the time and others of greater moment albeit, when viewed in isolation, not especially worrisome. Now that the UCL has, as this case again illustrates, morphed into a malignancy in terms of its scope and application, neither creator is realistically able to do the radical surgery necessary to make it function fairly and efficiently. Each branch of government points the finger of responsibility for the UCL's current incarnation to the other; and each claims that the other branch, by acquiescing to whatever latest wrinkle its co-ordinate last placed on the UCL, obviously approves of that construction.

In the course of this "buck-passing" metamorphosis of the UCL, vested interests have, not surprisingly, cropped up to defend its most recent and expansive iteration. As the UCL's elastic reach has extrapolated, so have those who benefit from that reach grown in size and influence sufficient to thwart state legislative or judicial reform of the UCL, what they describe as "turning back the clock" to the previous case that expanded the UCL before the last one. Thus the

direction of the UCL's movement has been consistent – outward and expansionist, enveloping an ever greater array of proscribed conduct, and upward, making it easier and more attractive for more people to go after that conduct.

This peculiar historical development of the UCL yields a statute different from that of all other states who have analogous laws codifying common law prohibitions on unfair competition, most modeled on the Federal Trade Commission Act enacted at the turn of the 20th century. In these other states, either the legislatures, the courts or both have imposed limits on standing or who can assert the UCL, the scope of its prohibited conduct and the relief available under it that are not found in California's unfair competition law. These differences, while impacting most obviously and severely upon those doing business in California, ironically also effectively immunize cases brought in California state courts from being brought in or removed to federal courts. California's UCL, then (as interpreted by its state courts) effectively sets the standards for all the other states regarding allowable business practices since no business is an island, but a ship sailing in a stream of interstate commerce. Businesses who want, then, to do what businesses do in California, will conform their practices to what California, the state with the most onerous unfair competition law, requires. Accordingly, if the UCL is ever to become a fair law of reasonable scope and sensible application, this case presents that rare and essential opportunity.

REASONS FOR GRANTING THE WRIT

I. THE SCOPE OF SPEECH AND CONDUCT PROSCRIBED BY THE UCL IS OVERBROAD.

It is difficult to imagine a statute more overly broad in its sweep of protected as well as unprotected speech or conduct than the UCL. Only by arbitrarily categorizing the

"speech" by Nike in this case as "commercial" and thus entitled to lesser protection than "non-commercial" speech, could the California Supreme Court majority shut its eyes to the reality that this application of the UCL inhibits, at the very least, a substantial amount of protected speech. (*Houston v. Hill* (1987) 482 U.S. 451, 458.) Given the consistently expansionist judicial gloss placed on the UCL over the past quarter century, however, its resulting overbreadth was predictable.

The precursor to today's UCL was former Civil Code section 3369, which originally read: "Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case." In 1933, the Legislature created the modern UCL by expanding section 3369's exception for nuisance cases to include unfair competition cases. The 1933 amendment to the statute provided injunctive relief from unfair competition and defined "unfair competition" to include "unfair or fraudulent business practice" as well as false advertising.

In 1963, the Legislature further broadened section 3369 by adding in the disjunctive the word "unlawful" to the types of wrongful business conduct that could be enjoined as unfair competition. According to the author of this legislative change, its purpose was "to clarify the statutory definition of unfair competition."[9] The one page "Report on Assembly

[9] Letter of Assemblyman Philip L. Soto to Governor Edmund G. Brown re: Assembly Bill 2929, dated July 10, 1963 and enclosing memorandum of Charles A. James, Assistant Attorney General re: AB 2929. The two page memorandum from Charles A. James, dated June 14, 1963 and written on Department of Justice letterhead, states, in relevant part:

> [T]he word "unlawful" is inserted in the definition to clarify the statutory definition of "unfair competition" to concur with judicial trends.

Bill 2929" from the Legislative Counsel dated July 1, 1963 merely states that the bill "[a]dds to the definition of the term 'unfair competition' for purposes of granting specific or preventive relief, 'unlawful' as well as unfair or fraudulent business practice and unfair, untrue or misleading advertising." Thus it appears from all available legislative history that the purpose of this amendment was to provide an injunctive remedy for the common law prohibition against "unfair competition" that was not necessarily "fraudulent," but did *injure* law abiding competitors (i.e., funeral homes that obeyed zoning ordinances).

Despite this modest beginning, a series of judicial interpretations have given a broader meaning to the 1963 amendment than it legislative history suggests was intended. The first opinion to do this was *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, a case that came before

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The case of *Stockton v. Frisbie & Latta* (1928) 93 Cal.App. 277, enunciated the principle that an unlawful act (here a violation of the zoning ordinance) is a proper subject of injunction. Although the courts have consistently held that the Attorney General has the authority to enjoin unlawful acts [citations] it is clear that the legislature intended the control of unfair competition by the procedure set forth in section 3369. It is not altogether clear that an individual acting in his own interest can find the relief ostensibly afforded him by the provisions of the section unless he shows the act of unfair competition to be fraudulent. . . . Inasmuch as the Legislature has seen fit to extent (sic) remedies to all persons who wish to correct acts of unfair competition, such acts should be clearly defined in the statute so that individuals as well as the Attorney General can be assured of prompt and effective remedy against unlawful acts which may not fall within the definition of fraudulent practices.

the state supreme court on a demurrer sustained to a UCL complaint against a collection agency for filing small claims court actions in improper counties to impair its adversaries' ability to defend themselves. In a unanimous opinion, the court acknowledged that as "originally enacted" in 1933 the UCL defined "unfair competition" only in terms of "unfair or fraudulent business practices"; and conceded that court opinions had interpreted the "essence" of the UCL "as the protection from any conduct likely to deceive the consumer." (*Id.* at 111.) *Barquis* stated that the 1963 amendment, about which it felt the legislative history was "not particularly instructive" *(id.* at 112) and which it did not discuss, intended by the "sweeping language" of "unlawful, unfair *or* deceptive business practice" to "permit tribunals to enjoin on-going *wrongful* business conduct in *whatever context such activity might occur.*" (*Id.* at 111.)

Barquis was followed by *People v. McKale* (1979) 25 Cal.3d 626, where a district attorney sued a mobile home park under the UCL. The complaint alleged that the UCL had been violated because the Mobilehome Parks Act and various other sections of the Administrative Code made the particular business procedures adopted by the mobile home park unlawful. In opposition, the mobile home park argued that the Commission on Housing and Community Development, an administrative agency, was the only entity authorized to enforce the Mobilehome Parks Act and the other related sections of the Administrative Code; thus, precluding prosecution by the district attorney. The Court disagreed and held that the district attorney had authority to bring suit under the UCL because "an unlawful business practice includes anything that can properly be called a business practice and that is at the same time forbidden by law." (*Id.* at 632.)

Then came *People v. E.W.A.P.* (1980) 106 Cal.App.3d 315, which extended the reach of unlawful

business practices to include a violation of a penal statute. The defendant in *E.W.A.P.* was a California corporation with its principal place of business in Chatsworth. It was alleged by the district attorney that defendant E.W.A.P. had been engaged in commercially distributing and possessing for commercial distribution "obscene" materials in violation of Penal Code §311.2.[10] The appellate court held that the district attorney could maintain an action under the UCL for violations of the Penal Code because the activity was "unlawful." (*Id.* at 318-319.) Furthermore, the court found that defendant E.W.A.P.'s activities were "business practices" because they were engaged in "commercial" distribution or possession for "commercial" distribution of obscene matter over a period of approximately a year. (*Id.*)

While *McKale* and *E.W.A.P.* were public enforcement actions by district attorneys of, respectively, an administrative regulation and a penal statute, they paved the way for yet another expansion of the UCL: a *private enforcement* action based upon a violation of state law. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197 involved a challenge by consumers to the marketing and advertising of sugared breakfast cereals that the plaintiffs contended were not really "cereals" but sugar products. Besides the UCL, plaintiffs' complaint referred to a cause of action based upon the state's Sherman Food, Drug and Cosmetic Law, which provided that "[i]t is unlawful for any person to disseminate any false advertising of any food, drug, device, or cosmetic." (Cal. H & S C § 26460.) The defendant challenged plaintiffs' right to bring a private enforcement action under the Sherman Food, Drug and

[10] Apparently, the district attorney prosecuted E.W.A.P. civilly under the UCL, as opposed to criminally under Penal Code §311.2, because of the remedies offered by the UCL. Specifically, injunctive relief and restitution.

Cosmetic Act, which the court conceded did "not expressly provide for private enforcement." (*Id.* at 210.) Yet the court said that the question "whether a private right of action should be implied under this statute . . . is immaterial since any unlawful business practice . . . may be redressed by a private action charging unfair competition in violation of [the UCL]." (*Id.* at 210-211.)

Not surprisingly, the disjunctive nature of the terms "unfair" or "unlawful" in the UCL eventually led to the judicial conclusion that a practice could be *lawful*, but still proscribed because it was "*unfair*." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163.) Thus there are two major independent prongs to the UCL – "unfair" or "unlawful" – to which a multitude of other laws can be "bootstrapped" and become the predicate for UCL enforcement. Under the "unlawful" prong it is now permissible for almost any other law – "be it civil or criminal, federal, state, or municipal, statutory regulatory, or court-made"[11] – to secure a "toehold" and be enforced through the remedies available under the UCL. Even violation of a court order has been enforced by the UCL's injunctive remedy, permitting the plaintiff to bypass contempt proceedings. (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 533.)

The "unfairness" prong offers even more creative possibilities. Thus far it has been interpreted to mean "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws,"[12] and to also prohibit the insertion of "unconsionable" provisions in contracts (*Olson v. Breeze, Inc.* (1996) 48

[11] *Saunders v. Superior Court* (1994) 27 Cal. App. 4th 832, 838-839.

[12] *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra*, 20 Cal.4th at 187.

Cal.App.4th 608.) But why not equate "unfair" with, or "bootstrap" to that prong, the "due process" guarantee of the Constitution, which is often itself viewed as synonymous with "fundamental fairness"? (See *In re Sade* (1996) 13 Cal.4th 952, 966.) This way a lawyer cum social engineer can incorporate and make applicable to private persons the Bill of Rights without paying homage to the necessity of "state action." This is not far fetched, but a logical consequence of the seemingly inexorable expansion of the UCL by the courts.

Over the years the variety of activities swept within the UCL's proscriptive prongs has grown to include the sale of whale meat contrary to the Penal Code,[13] the filing of small claims court lawsuits by a collection agency in improper counties,[14] the use of the "Joe Camel" caricature in the advertising of cigarettes because of its likely influence on minors,[15] the sale by convenience stores of cigarettes to minors in violation of the Penal Code,[16] and the marketing and advertising of sugared cereals which, while labeled "cereals," were allegedly "sugar products or candies."[17] Is it any wonder that from this amorphous collection of holdings a court would cobble together the instant case: a business found facially liable under the UCL because it publicly defends itself against what it feels are unfounded attacks on its overseas operations? At this pace it will not take long, unless this Court acts to tether the UCL to some "bright line" parameters, before we see various provisions of the Constitution enforced against private parties absent any "state

[13] *People v. Sakai* (1976) 56 Cal.App.3d 531.

[14] *Barquis v. Merchants Collection Assn.*, *supra*, 7 Cal.3d 94.

[15] *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057.

[16] *Stop Youth Addiction v. Lucky Stores, Inc.*, *supra*. 17 Cal.4th 553.

[17] *Committee on Children's Television, Inc. v. General Foods Corporation*, *supra*, 35 Cal.3d 197.

action," which is just another way of warning that Big Brother, in the form of the UCL, is knocking on our doors.[18]

Significantly, when the California Supreme Court was recently presented with yet another opportunity to retreat from the expansive gloss it had placed on the sweep of the UCL by deciding that a private enforcement action should not be permitted of a penal statute, it declined to do so, stating that "had the Legislature at any time desired to change the UCL so as to restrict its application . . . [after judicial opinions expanded it], it undeniably has had ample time to do so." (*Stop Youth Addiction v. Lucky Stores, Inc.*, *supra*, 17 Cal4th at 563.) The dissenting opinion remarked about this that "[o]ne need only read the daily newspapers to see how much easier it is to stall legislation than to enact it; how much simpler to expand what exists than to contract it. Courts can take advantage of this political infirmity by calling it 'acquiescence.'" (*Id.* at 598, dissenting opn. of Brown, J.)

No other state has vested its unfair competition laws with the stellar reach of California's UCL. They have, in fact, avoided California's extrapolation to the stars when it comes to defining the reach of their laws prohibiting unfair competition. Delaware, for example, has codified the common law of unfair competition for which it provides an extensive list of proscribed practices, focusing on unreasonable or unfair interference with the "horizontal" relationships between various business interests. (See 6 Del. C. §§ 2531-2536; *Grand Ventures, Inc. v. Whaley* (Del. 1993) 632 A.2d 63.) Illinois is similar. (815 ILCS 510/1 et. seq.; 720 ILCS 295 et. seq.) The District of Columbia's

[18] "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of . . . law and avoids the imposition of responsibility on a state for conduct it could not control." (*Morse v. Republican Party of Virginia* (1996) 116 S. Ct. 1186, 1220.)

statute against false or deceptive advertising prohibits any false advertisement that is made, in contrast to California's strict liability approach, with the *intent* to sell goods, to induce any person to purchase property, or to induce any person to employ another's services for a valuable consideration. (D.C. Code Ann. § 22-1511; *Green v. United States* (D.C. 1973) 312 A.2d 788, 789-90.) Indeed, a comprehensive review of all the states with laws against unfair competition and false advertising, reveal none as far reaching as California's UCL. When some facially appear to cover, like the UCL, the gamut of all possible human activities, brakes have been placed on them through restrictions on standing or who may prosecute actions under them, something the UCL totally lacks.

II. THE UCL IS UNIQUE IN COMPARISON TO ANALOGOUS LAWS OF OTHER STATES IN THAT ANYONE MAY SUE UNDER IT REGARDLESS OF WHETHER THAT PERSON HAS BEEN HARMED OR MISLED BY THE CHALLENGED CONDUCT.

When *Barquis* expanded the ambit of conduct that came within the UCL's proscription, it also relaxed any "standing" requirements under it, effectively enlarging the universe of those who could prosecute a UCL action to anyone with a gripe. That opinion concluded that Business and Professions Code section 17204 authorized prosecutions by "the Attorney General [and other public attorneys] . . . *or* by any person acting for the interests of itself, its members or the general public." (*Barquis*, *supra*, 7 Cal.3d at 109, italics added.) It reached this conclusion, which it felt "clear," from the plain language of the statute.[19] The dissent in *Stop Youth*

[19] Section 17204 provides: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent

Addiction pointed out that this reading of the statutory language runs "afoul of significant grammatical impediments," including making "the main clause superfluous and fail[ing] to account for other language in the statute – 'in the name of the people of the State of California,' 'upon the complaint of,' and 'exclusively.'" (*Stop Youth Addiction v. Lucky Stores, Inc.*, *supra*, 17 Cal.4th at 586-587, dissenting opn. of Brown, J.) Taking account of those grammatical considerations in parsing the meaning of the statute would produce "a narrower reading" – "one that channels UCL litigation through government prosecutors who file actions in the name of the people [and] . . . would explain why the drafters failed to insert *any* qualification on standing. Indeed, this 'gatekeeper' construction of the text is the only one consistent with rudimentary notions of procedural fairness." (*Id.* at 587.)

Other states have confined their unfair competition and unfair trade practice laws, or at least some of the remedies available under those laws, to enforcement by public prosecutors, or at least give public prosecutors the first chance to consider whether to challenge the complained of conduct. This furthers a more uniform and balanced

jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public."

enforcement approach of the law because the prosecutorial discretion of public lawyers, in contrast to the unfettered and unchecked appetites of too many fee motivated private counsel, are "curbed by established notions of ethical responsibility" and "political accountability." (*Id.* at 592.) Thus numerous states require proof of individualized harm or reliance for *private* enforcement actions under their unfair competition or false advertising laws, but relax that requirement when suit is brought by a public prosecutor.[20] Some states, of course, restrict enforcement of their unfair trade practices laws to public prosecutors.[21] Still others limit restitutionary relief under their laws to suits brought by the Attorney General.[22]

Nonetheless, California's high court holds in favor of *universal* standing and emphasizes that "any unlawful business practice . . . may be redressed by a private action" under the UCL. (*Id.* at 561-563.) This effectively means the UCL is completely disconnected from any notion, not only of competitive harm, but any injury at all. Omission of the requirement that a plaintiff show actual harm from the conduct challenged invites litigation that is not genuine and should not be filed. The requirement that a litigant show

[20] See, e.g., Colo. Code § 6-1-113, *Hall v. Walter*, 969 P.2d 224, 235 (Co. 1998) (en banc), *May Dept. Stores Co. v. State*, 863 P.2d 967, 972-73 (Co. 1993) (en banc); Fla. Code Ann. §§ 817.41, 501.204, *Himes v. Brown & Secs. Corp.*, 518 So. 2d 937, 938 n.1 (Fla. Dist. Ct. App. 1987) (per curiam). These features and others showing how the UCL differs from analogous laws of other states are found in the chart attached hereto as an Appendix.

[21] Iowa Code § 714.16(7); Minn. Stat. §325F.67 ("The duty of a strict observance and enforcement of this law and prosecution for any violation thereof is hereby expressly imposed upon the attorney general.").

[22] E.g, Alaska Stat. § 45.50.501(b); Ohio Rev. Code Ann. § 1345.07(F) (Attorney General expressly authorized to seek restitution.).

actual, individualized injury "prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders"; "pleadings must be something more than an ingenious academic exercise in the conceivable." (*United States v. SCRAP* (1973) 412 U.S. 669, 687, 688.)

The UCL not only omits any requirement of standing to prosecute conduct under it, it goes further and effectively strips away whatever standing requirements apply to the predicate statutes that are bootstrapped to the UCL for enforcement. Thus in *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1337 a citizens group sued for housing discrimination under specific statutes prohibiting discrimination and the UCL. When the plaintiff organization could not demonstrate that any one member had been refused housing at defendant's apartments or even wanted to live there, the appellate court held that they lacked standing under the pertinent housing discrimination statutes, but avoided that problem by attaching and enforcing them through the UCL, which has no standing requirement. (*Id.* at 1393.)

The elimination of any requirement that a plaintiff prosecuting under the UCL demonstrate tangible injury is unique to California. The overwhelming majority of other state laws on unfair competition and false advertising require actual injury, monetary damage, causation or something specific besides the mere denunciation of defendant's conduct, somewhere, somehow, by someone, as "unlawful" or "unfair." These standing requirements, of course, serve to distinguish a genuine lawsuit from a contrived or frivolous one.[23] They also allow, as Petitioner points out, for the

[23] See Appendix herein of state laws analogous to the UCL showing why respondent would be unable to prosecute his claim in each of those states.

removal of suits asserting these rights to federal court, something that cannot be done when, as here, plaintiff disavows any injury essential to make a claim cognizable in federal court.[24] Elimination of the "actual injury" requirement under a law as expansive in its reach as the UCL not only encourages social reformers without real clients to misuse the courts and bypass the more representative and political branches of government to get what they want, it invites litigation primarily to collect attorney fees.[25] This does not further the public interest, but subverts it for the benefit of a few.

CONCLUSION

For all the aforementioned reasons, as well as the reasons articulated by petitioner, certiorari should be granted.

Respectfully submitted,

William L. Stern
Severson & Werson
1 Embarcadero Center
Suite 2600
San Francisco, CA 94111
(415) 398-3344

Fred J. Hiestand
Counsel of Record
1121 L Street, Suite 404
Sacramento, CA 95814
(916) 448-5100

[24] Petition, p. 29.

[25] A recent news article accurately described the inevitable consequence of marrying the omnivorous UCL with ambitious lawyers desirous of reaching out and touching someone with a lawsuit to obtain an attorney fee. "They blanket the business world with hundreds of lawsuits at a time, often making claims that appear fanciful, even absurd. Most of the cases never get to trial. The lawyers make their money on settlements paid by defendants who just want to make the suits go away. The amounts typically are modest – from $2,000 to $50,000 – but they add up." (Monte Morin, *Lawyers Who Sue to Settle*, LOS ANGELES TIMES, Oct. 26, 2002, Pt. 1, p. 1.)

APPENDIX A

Unfair Trade Practice Laws and False Advertising Laws

Chart I: Assessing the Reasons Why Kasky's Claim Would Fail in Each Respective State

State	Unfair Trade Practice Law	False Advertising Law
Alabama	**No injury;** Monetary damage to consumer is required - private right of action depends on whether plaintiff suffered any monetary damages as a result of the defendant's actions. See, Billions v. White & Stafford Furn. Co., 528 So. 2d 878 (Ala. Civ. App. 1988).	**No private action, no product reference** (the false or misleading statement must be made in connection with the promotion of a sale – § 13A9-42)
Alaska	**No injury (required for damages);** Harm (but not actual monetary damages) is required to recover damages under §45.50.531(a). **Not a "victim" (required for injunctive relief):** "any person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action to obtain an injunction." Alaska Stat. §45.50.535(a)	No separate FAL
Arizona	**No injury:** Arizona provides an implied private right of action for compensatory and punitive damages, *Dunlap v. Jimmy GMC, Inc.*, 666 P.2d 83, 87 (Ariz. Ct. App. 1983), and thus likely for injunctive relief as well. To state such a claim, the plaintiff must prove (1) a misrepresentation and (2) the plaintiff's consequent and proximate injury. *Id.*	**No private cause of action** (§44-1481, See, Ward v. Fireman's Fund Ins. Co., 152 Ariz. 211, (Ct. App. 1986). **No product reference** (must make misleading misrepresentation of the product - §44-1481(a)(1).)
Arkansas	**No injury;** "Any person who suffers actual damage or injury as a result of an offense or violation as defined in this chapter has a cause of action to recover actual damages, if appropriate, and reasonable attorney's fees." Ark. Code Ann. § 4-88-113(f)	No separate FAL
Colorado	**No injury; not an actual/potential consumer:** "An action under this section shall be available to any person who: Is an actual or potential consumer of the defendant's goods, services, or property and is injured as a result of such deceptive trade practice." Col. Gen Stat. **§6-1-113(1)(a)**	**No private cause of action** (criminal code - §18-5-301)
Connecticut	**No injury;** person "must suffer ascertainable loss of money or property as a result of the act or practice" of the company. Conn. Gen. Stat. §42-110g(a)	No separate FAL
Delaware	**No likelihood of injury:** only person "likely" to be damaged by a deceptive trade practice can bring suit. Title 6 Del Code Ann. §2533(a)	**No private cause of action** (criminal code - Del Code Ann. §906)
Florida	**No injury:** action must be "brought by a person who has suffered a loss as a result of a violation." Fla. Stat. Ann. §501.211(2)	**No private cause of action** (criminal code Fla. Stat. Ann. §817.40-47)
Georgia	**No likelihood of injury;** "A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it ... Proof of monetary damage, loss of profits, or intent to deceive is not required." §10-1-373. **Injunction is only remedy:** *Id., See also, Lauria v. Ford Motor Co.*, 169 Ga. App. 203, 312 S.E.2d 190 (1983) (The "sole remedy provided under this section is injunctive relief.").	**No private cause of action** (criminal code §10-1-421)

Hawaii	**If no injury, only injunction available:** Hawaii amended its deceptive practices statute in June to allow "[a]ny person [to] bring an action based on unfair methods of competition." Haw. Stat. Ann. § 480-2(e). But the standing limits on seeking private remedies survive this amendment: only people "injured in [his or her] business or property," *id.* § 480(a), or suffering other "injur[y]," *id.* § 480-13(b) can take advantage of Hawaii's remedies.	**No private cause of action;** (criminal code Haw. Stat. Ann. §708-871) **No product reference;** "false advertising if in connection with the promotion of the sale" Haw. Stat. Ann. §708-871.
Idaho	**No purchase; no ascertainable injury**: "Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this act, may treat any agreement incident thereto as voidable or, in the alternative, may bring an action to recover actual damages." Idaho Code § 48-608(1).	No separate FAL
Illinois	**No injury;** "Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper." **815 ILCS § 505/10a.**	**No private cause of action** (criminal code 720 ILCS §2951/a)
Indiana	**No reliance; No injury;** "A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act." IC §24-5-0.5-3(a).	**No private cause of action** (criminal code IC 35-43-5-3)
Iowa	**No private cause of action;** act is enforced by AG (Iowa Code §714.16(15))	No separate FAL
Kansas	**No injury:** only a consumer who is "aggrieved by an alleged" deceptive act can bring suit – "Whether a consumer seeks or is entitled to damages or otherwise has an adequate remedy at law or in equity, a consumer aggrieved by an alleged violation of this act may bring an action." Kan. Stat. Ann. §50-634(a)	No separate FAL
Kentucky	**No injury; no purchase; no reliance**: "Any person who purchases ... goods or services ... and thereby suffers any ascertainable loss of money or property ... as a result ... of a method, act or practice declared unlawful ... may bring an action." Ky. Rev. Stat. Ann. §367.220	**No private cause of action** (criminal code Ky. Rev. Stat. Ann.§517.030)
Louisiana	**No financial injury; representative capacity not allowed:** "Any person who suffers any ascertainable loss of money or movable property... as a result of ... an unfair or deceptive method... may bring an action individually but not in a representative capacity to recover actual damages." § La. R.S. 51:1409(a)	No separate FAL

Maine	**No purchase; no injury;** Any person who purchases or leases goods... and thereby suffers any loss of money or property, ... as a result ... of a method, act or practice declared unlawful ... may bring an action ... for actual damages, restitution and for such other equitable relief, including an injunction." Me. Rev. Stat. Ann. tit. 5 §213). See also Me. Rev. Stat. Ann. tit. 10 §1213 (injunction only is available under this section)	**No private cause of action** (criminal code Me. Rev. Stat. Ann. tit. 17-A §901)
Maryland	**No injury:** "Any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title." Md. Code Ann. Comm. Law I § 13-408(a)	**Not material/no product reference;** "To determine if an advertisement is misleading, the following... shall be considered: (2) The extent to which the advertisement fails to reveal a fact which ... is material with respect to the advertised commodity." **No private cause of action** (criminal code, Md. Code Ann. Comm. Law I §11-704)
Massachusetts	**No injury; no causation:** Any person ... who has been injured by another person's use or employment of any method, act or practice declared to be unlawful ...may bring an action in the superior court... for damages and such equitable relief, including an injunction." 93A MGL §9(1)	**No private cause of action** (criminal code 266 MGL §91)
Michigan	**No injury;** "a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages" Mich. Stat. Ann. §445.911(2)	**No injury; no reliance** "a person who suffers loss as a result of a violation of this act ... may bring an individual or a class action to recover actual damages" Mich. Stat. Ann. §445.360(2)
Minnesota	**No injury/ likelihood of injury (injury is required when seeking damages, likelihood of injury is required for injunction)** See: *Group Health Plans v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001) and Minn. Stat. §325D.45 ("A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required.")	**Enforced by the AG:** "The duty of a strict observance and enforcement of this law and prosecution for any violation thereof is hereby expressly imposed upon the attorney general" – Minn. Stat. §325F.67
Mississippi	**No purchase; no injury;** "Any person who purchases or leases goods or services ... and thereby suffers any ascertainable loss of money or property, ... as a result ... of a method, act or practice prohibited by Section 75-24-5 may bring an action ... to recover such loss of money or damages for the loss of such property." Miss. Code. Ann. §75-24-15(1)	**No private cause of action** (criminal code Miss. Code. Ann. §97-23-1)

Missouri	**No purchase; no injury;** "Any person who purchases or leases merchandise ... and thereby suffers an ascertainable loss of money or property... as a result ... of a method, act or practice declared unlawful by section 407.020, may bring a private civil action ... to recover actual damages." Mo. Rev. Stat. § 407.025(1)	**No private cause of action** (criminal code Mo. Rev. Stat. §570.160)
Montana	**No purchase; no injury/loss** "Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, ... as a result of ... a method, act, or practice declared unlawful by 30-14-103 may bring an individual but not a class action." Mt. Stat. §30-14-133(1)	**No private cause of action** (criminal code Mt. Stat. §45-6-317)
Nebraska	**No injury:** "Any person who is injured ... may bring a civil action in the district court to enjoin further violations, to recover the actual damages sustained by him, or both." Neb. Rev. Stat. Ann § 59-1609. Only equitable relief is available under the Uniform Deceptive Trade Practices Act; money damages cannot be recovered. See Al'Amin v. McDonalds Corp., -- F. Supp. 2d --, 2001 U.S. Dist. LEXIS 14274, (D. Neb. 2001).	**No private cause of action** (criminal code Neb. Rev. Stat. Ann §28-1476)
Nevada	**Not a victim; no equitable relief:** " An action may be brought by any person who is a victim of consumer fraud. (3) If the claimant is the prevailing party, the court shall award him: (a) Any damages that he has sustained; and (b) His costs in the action and reasonable attorney's fees. Nev. Rev. Stat. Ann. §41-600(3)	**No private cause of action** (criminal code Nev. Rev. Stat. Ann. §207.171)
New Hampshire	**No injury:** "Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper." N.H. Rev. Stat. §358-A:10(I)	**No private cause of action** (criminal code N.H. Rev. Stat. §638:6)
New Jersey	**No loss/injury:** "Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of ... any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action ... in any court of competent jurisdiction." N.J. Stat. Ann § 56:8-19	No separate FAL

New Mexico	**No likelihood of injury (likelihood of harm required for injunction); equitable relief limited to injunction:** "A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required." §57-12-10(a). **No monetary loss (loss required for damages);** "Any person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages." N.M. Stat. Ann. § 57-12-10(b)	**Not material, no product mention.** (N.M. Stat. Ann. §57-15-2)
New York	**No injury;** "Any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice an action to recover his actual damages, or both." NY CLS Gen Bus §349(h)	**No private cause of action** (criminal code NY CLS Gen Bus **§190.20)**
N. Carolina	**No injury;** "If any person shall be injured ... by reason of any act or thing done ... in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done." N.C. Gen. Stat. §75.16	**No private cause of action** (criminal code N.C. Gen. Stat. §14-117)
N. Dakota	**No private cause of action:** See *Trade 'N Post, L.L.C. v. World Duty Free Ams.*, Inc., 2001 ND 116, 628 N.W.2d 707 (2001). (The state UTP (§51-10) does not contain a **private** right of action for damages for violations given the legislature's failure to expressly provide one).	**No injury;** See *Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection*, 444 N.W.2d 683 (N.D. 1989) (One injured by a violation of the false advertising statutes (§51-12-01, 51-12-08) may bring an action to recover damages).
Ohio	**No likelihood of injury; only injunctive relief is available:** "A person who is likely to be damaged by a person who commits a deceptive trade practice ... may commence a civil action for injunctive relief." Ohio Rev. Code Ann. §4165.03(a)(1)	No separate FAL

Oklahoma	**No injury (injury required for damages):** "The commission of any act or practice declared to be a violation of the Consumer Protection Act shall render the violator liable to the aggrieved consumer for the payment of actual damages sustained by the customer. Title 15 Okl. St. § 761.1(A) **No likelihood of injury (likelihood of injury required for injunction); equitable relief limited to injunction:** "Any person damaged or likely to be damaged by a deceptive trade practice of another may maintain an action in any court of equitable jurisdiction to prevent, restrain or enjoin such deceptive trade practice. Proof of actual monetary damages, loss of profits or intent shall not be required. If in such action damages are alleged and proved, the plaintiff, in addition to injunctive relief, shall be entitled to recover from the defendant the actual damages sustained by the person. 78 Okl. St. § 54(A) (2002)	**No private cause of action** (criminal code 21 Okl. St. §1502)
Oregon	**No injury/ascertainable loss:** "Any person who suffers any ascertainable loss of money or property ... as a result of ... a method, act or practice declared unlawful ... may bring an individual action in an appropriate court." §646.638(1)	No separate FAL
Pennsylvania	**No purchase/not a customer; no injury:** "Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of ... of a method, act or practice declared unlawful ... may bring a private action to recover actual damages." §201-9.2(a)	No separate FAL
Rhode Island	**No purchase/not a customer; no injury:** "Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of ... a method, act, or practice declared unlawful ... may bring an action." Or. Rev. Stat. 6-13.1-5.2(a)	**No private cause of action** (criminal code Or. Rev. Stat. §11-18-10)
S. Carolina	**No injury; no representative capacity** "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of ... an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." S.C. Code Ann. §39-5-140(a)	No separate FAL
S. Dakota	**No injury; no remedy available other than actual damages;** "Any person who claims to have been adversely affected by any act or a practice declared to be unlawful by § 37-24-6 shall be permitted to bring a civil action for the recovery of actual damages suffered as a result of such act or practice." S.D. Codified Laws §37-24-31	**No product reference** (statement must be "regarding merchandise"); **no private cause of action** (criminal code S.D. Codified Laws §22-41-10)

Tennessee	**No injury/ascertainable loss for actual damages:** "Any person who suffers an ascertainable loss of money or property, ... as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages." Tenn. Code Ann. §47-18-109(a)(1) **Plaintiff must be "affected" to get injunction; no restitution is available:** "anyone affected by a violation of this part may bring an action ... to enjoin the person who has violated, is violating, or who is otherwise likely to violate this part. Tenn. Code Ann. §47-18-109(b)	**No private cause of action** (criminal code Tenn. Code Ann. §39-14-127)
Texas	**Not a consumer/no purchase; no injury; no reliance:** "A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish: (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is... relied on by a consumer to the consumer's detriment." Texas Bus & Com Code §17.50(a)	**Not material; no product reference** ("A person commits an offense if ... he intentionally (12) [makes] a materially false or misleading statement in an advertisement for the purchase ... of property or service." §32.42(12)(a)) **No private cause of action** (criminal code)
Utah	**No loss suffered/injury (required for damages); no standing requirements for injunction; no restitution available:** "(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $ 2,000, whichever is greater, plus court costs. (3) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief against an act or practice that violates this chapter." (Utah Code Ann. §13-11-19(2)).	**No prior notice:** "Any person or the state may maintain an action to enjoin a continuance of any act in violation of [Utah's Truth in Advertising Act] and, if injured by the act, for the recovery of damages. ... (5) No action for injunctive relief may be brought for a violation of this chapter unless the complaining person first gives notice of the alleged violation to the prospective defendant and provides the prospective defendant an opportunity to promulgate a correction notice by the same media as the allegedly violating advertisement." (Utah Code Ann. §13-11A-4(a)) **Statements not advertising under act's definition:** ""Advertisement" means any written, oral, or graphic statement or representation made by a supplier in connection with the solicitation of business." (Utah Code Ann. §13-11a-2(a))

Vermont	**No reliance; no injury** "Any consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453 ... or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by section 2453 of this title, ... may sue for appropriate equitable relief." 9 V.S.A. § 2461(b).	**No private cause of action** (criminal code 13 VSA §2005)
Virginia	**No injury/loss:** "Any person who suffers loss as the result of a violation of [UTP] shall be entitled to bring an individual action to recover damages. Va. Code Ann.§59.1-68.3	**No private cause of action** (criminal code Va. Code Ann. §18.2-216)
Washington	**No injury, no causal connection between injury and deceptive act:** "Any person who is injured in his or her business or property by a violation of [The UTP] ... may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both." (Rev. Code Wash. §19.86.090) See also *Northwest Strategies, Inc v. Buck Medical Servs., Inc.*, 927 F. Supp. 1343 (W.D. Wash. 1996) (The elements required to prove a violation of the UTP are: (1) defendant committed an unfair or deceptive act; (2) the act occurred in the conduct of trade or commerce; (3) the act has an impact on the public interest; (4) plaintiff's injury was caused by defendant's act). **No economic injury:** *See Pickett v. Holland Am. Line-Westours, Inc.*, 35 P.2d 351, 359 (Wash. 2001) (en banc) (noting the need for individualized proof in statutory consumer fraud cases).	**No private cause of action** (criminal code Rev. Code Wash. §9.04.010)
W. Virginia	**No purchase, no ascertainable injury/loss:** "Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article, may bring an action." § 46A-6-106(1).	No separate general FAL
Wisconsin	**No economic injury/loss:** "Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court ... and shall recover such pecuniary loss, together with costs." Wis Stat. §100.18 11(b)(2)	No separate FAL
Wyoming	**Not a consumer, no injury/damages; no reliance; no equitable relief:** "A person relying upon an uncured unlawful deceptive trade practice may bring an action under this act for the damages he has actually suffered as a consumer as a result of such unlawful deceptive trade practice." Wyo. Stat. Ann. §40-12-108(a)	**No private cause of action** (criminal code Wyo. Stat. Ann. §6-3-611)